UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES BUSEY, Plaintiff, vs. RICHLAND SCHOOL DISTRICT, et al., Defendants.	Case No. CV-13-5022-EFS May 17, 2013, P.M. Richland, Washington Motion Hearing Pages 1 - 25

BEFORE THE HONORABLE EDWARD F. SHEA
SENIOR UNITED STATES DISTRICT COURT JUDGE

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(Court convened on May 17, 2013, at 1:03 p.m.)

THE COURT: Good afternoon. Please be seated.

THE COURTROOM DEPUTY: The matter before the Court is Busey v Richland School District, Cause No. CR -- or, excuse me, CV-13-5022-EFS, time set for motion hearing. Counsel, please state your presence for the record.

MR. ILLER: Brian Iller on behalf of plaintiff, James Busey.

MR. McFARLAND: And Mick McFarland on behalf of all defendants.

THE COURT: Yes. Counsel, good to see you again. Let's get started. I've read the materials.

MR. McFARLAND: I'm sorry, your Honor?

THE COURT: I have read the materials.

MR. McFARLAND: Thank you. And, your Honor, may it please the Court and good afternoon. I am going to keep my comments very short today in part because I think the issue's been well briefed and another part because I think the issue before the Court is very clear. And I think the analysis --

THE COURT: Mr. Iller doesn't agree with you.

MR. McFARLAND: No, he doesn't.

THE COURT: Well, he does; but he thinks it's his -- it's in his favor.

MR. McFARLAND: He thinks it's clear the opposite direction. Yes, your Honor.

Before I talk specifics about the claims in this case, I do want to mention a couple of the policies that we keep in mind when dealing with any arbitration clause subject to the Federal Arbitration Act, first of which is that the Supreme Court has established a federal policy that, one, favors arbitration and, two, requires arbitration provisions to be rigorously enforced.

Next, cases make it very clear that the standard for demonstrating arbitrability is not high under the FAA.

Third, absent unmistakably clear language to the contrary, cases say arbitration should be ordered unless it can be said that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.

Cases also make it very clear that all doubts regarding whether or not a matter is arbitrable is to be -- or are to be decided in favor of arbitration.

And, lastly, the easy-to-define standard for what is arbitrable states that: To require arbitration, factual allegations need only "touch matters" covered by the contract containing the arbitration clause.

Now, in this case, your Honor, the arbitration provision provides that arbitration is required for "any dispute hereunder." There is no argument or opposition in this case to the applicability of the FAA to Dr. Busey's employment contract. And, really, the only question before the Court is whether or not the claims that Dr. Busey's making in this matter are

subject to arbitration. As previously stated and as briefed, I believe the answer to that question is very clearly "Yes."

The easy analysis that we glean from the case law, your Honor, is, as I already stated, that matters -- tort matters are subject to arbitration if the claims, quote, touch upon matters covered by the contract.

Cases also define arbitrability or say that arbitrability is required if it is necessary to interpret and rely upon the contract in order to resolve the claims. If those two propositions are true, then case law says a Court should order arbitration.

Conversely, what the cases say is that if the claim -- that claims fall outside the arbitration provision if those claims can stand independent of the contract containing the arbitration clause.

In the case cited and relied upon by Dr. Busey in his briefing, the Golden v Dameron case, the Court said: In order to not be covered by an arbitration provision, the claims must be able to be made, quote, without any reference to the terms of the contract. That, your Honor, in its most simple terms, is why Dr. Busey's claims in this case are subject to the arbitration provision and the FAA. Simply stated, none of his claims can be made without reliance upon and interpretation of his employment contract.

When you examine those claims under that analysis, I submit

that it's proper to start by noting that Dr. Busey attached a copy of the employment contract to his Complaint. And, then, as you read through the Complaint, there is reference to what the School District allegedly did and didn't do pursuant to Dr. Busey's employment contract.

For example, he alleges that the School District conducted a, quote, sham investigation before terminating him. He alleges that the bases set forth in the termination letter were merely pretexts for a discriminatory intent. He asks that this Court find that he is still employed pursuant to that employment contract and asks for an award of his salary through June of 2015 pursuant to that contract.

THE COURT: He does say that. Do you understand that to be that he's asking for an enforcement of the contract?

MR. McFARLAND: That's the only way I can read it, your Honor, yes.

THE COURT: Well, what do you make of the notion that he cited a statute that says, "If you don't do it thus and so, the contract's in full force and effect through the balance of the contract"? And he's not relying on the contract for that so much as he's pointing to the statutory language that requires notice and the failure to give it has certain consequences regarding the continuation of the contract through its full term.

MR. McFARLAND: Sure. And -- and the statute in

question, 28A.300.405 (sic), I believe, is specifically referenced in the employment contract; and it is the statute that gives the School District the authority in the first place to hire Dr. Busey.

And, secondly, the provisions -- the notice provisions and the procedures that he's claiming he was due are identical under the statute and under the employment contract.

And I would also point out, your Honor, that the statutory provisions that Dr. Busey claims he is due are due to him because of the employment contract. It -- they are -- they work part and parcel or hand in hand, your Honor, both the contract and the statute because, without the employment contract, Dr. Busey would have no procedural rights under the statute cited in his Complaint.

Did that answer your question, your Honor?

THE COURT: I think that in your reply brief you talked about the word "contract status" as having been used within 28A.405.310 and .300. And, so, your position is, yes, he's right; but it's so inextricably intertwined with the contract that it arises out of the contract because it gives a -- I understand you to say this is the procedure that gives enforcement rights to the contract status.

MR. McFARLAND: Yes. That is correct, your Honor.

THE COURT: Okay.

MR. McFARLAND: And, going back to what I said

earlier, I think the easiest way to analyze it is to envision a trial in this case that Dr. Busey was pursuing in this courtroom. Any claim that he would pursue against the School District which he has to rely upon any of the terms of the contract or any of the status that he has because of the contract, that claim is subject to arbitration because he can't prosecute the claim without reference to the contract and without reliance and interpretation on the contract.

And I think that you can distinguish that scenario, your Honor, with, for example, a defamation claim. If Dr. Busey was alleging that a certain board member had defamed him, that is a claim that he could prosecute without ever making reference to or relying upon the contract.

THE COURT: Sure. And defamation is clear enough. What about his assertion that it's his extra -- it's his marital status since the -- the assertion was that it was extramarital and, therefore, if that was the case, you could argue, I suppose, under the contract that there was a morals clause. But he makes much of the notion that, under WLAD, people are free to be free from discrimination because of marital status. You can't unemploy somebody because of marital status.

MR. McFARLAND: Absolutely. And, as an initial matter, your Honor, of course, the School District denies that it terminated Dr. Busey because of marital status but because he was having an affair with a subordinate, which raises issues

separate and apart from whether Dr. Busey --

THE COURT: Where do you think the phrase "extramarital" -- where do you think the word "extramarital" came from?

MR. McFARLAND: I mean --

THE COURT: It comes from a dictionary. But, beyond that, wasn't it used in connection with the correspondence or --

MR. McFARLAND: I think so.

THE COURT: -- news releases or statements?

MR. McFARLAND: I think it was, your Honor. And I think, however, we're getting into what the intent of the writer was in that letter. I -- I don't know the answer to that. I don't know what the evidence will be.

THE COURT: All right.

MR. McFARLAND: But I can submit that the -- it's my understanding that the basis of the termination was not that Dr. Busey was married but that Dr. Busey was having an affair with a subordinate.

And, in addition to the --

THE COURT: So it wouldn't make any difference whether he was a bachelor or whether he was divorced or whether he was married.

MR. McFARLAND: Absolutely doesn't make a difference, your Honor. It's the fact that he's having an affair with a subordinate. That is the issue.

THE COURT: What do you make of the -- this business of the date of the termination and the date of notice?

MR. McFARLAND: I think that Dr. Busey, with all due respect, your Honor, is -- is playing with semantics because -- and claiming that he was terminated based upon the probable cause letter that was sent out that specifically referenced the statute which gives Dr. Busey the right to have the procedure that's due to him. So it really is a matter of semantics.

THE COURT: Okay. Thank you.

MR. McFARLAND: I would just point out, your Honor, in addition to the morality clause that you referenced, there is also a just cause provision in the contract. And it's going to be the School District's position that whether or not the affair with a subordinate is terminable under the morality clause, it gave just cause under the contract to terminate Dr. Busey. And that is why the defense of the case is going to be relying upon, in part, the contract of Dr. Busey. And that claim, therefore, touches that contract.

THE COURT: What do the cases say about that?

MR. McFARLAND: About what, your Honor?

THE COURT: About the fact that the defense arises out of the contract. Some of the cases, some of the opinions, have dealt with that subject, haven't they, in the handful of cases that you both talked about?

MR. McFARLAND: I believe so, your Honor, because I

believe the -- the language refers generally to interpretation of the contract. And whether that's the defense's interpretation or the plaintiff's interpretation, the interpretation of the contract's going to be either a matter of law or a question of fact for the jury, whether it's coming from the defense or from the plaintiff.

THE COURT: Okay. So, when I look at the Claims for Relief, Page 14 of Document 1, in this case, there are three claims: The 1983; the WLAD, marital status discrimination; and, then, the liability under RCW 49 for wages and attorney's fees; and, then, finally a declaratory judgment. And, using those three claims, what is your -- just sum up your position as to why these are all arbitrable.

MR. McFARLAND: I believe they are all arbitrable, your Honor, because they cannot be litigated without reference to an interpretation of the contract.

THE COURT: So that's the key.

MR. McFARLAND: That -- to me, that is the key. Like I said before, the cases, even the cases relied upon very heavily by Dr. Busey in his opposition, all refer back to the same language that -- I'll find it here, your Honor. It's both the Mediterranean case and the Tracer Research Corp case both refer to claims being arbitrable if they, quote, relate to the interpretation and performance of the contract.

The Tracer Research Corp case said that, when a tort claim

constitutes an independent wrong from any breach of contract and does not require interpretation of the contract, it's not arbitrable.

It's our position that all of the claims are not independent, and they have to be based upon the contract --

THE COURT: Oh, let's take them one by one.

MR. McFARLAND: Okay.

THE COURT: Let's start with marital status discrimination.

MR. McFARLAND: Okay.

THE COURT: How does that arise? I think it's "any dispute hereunder" is the language here, not "relating to," which is very broad, but "any dispute hereunder." So tell me why marital status "arises hereunder" meaning --

MR. McFARLAND: Sure. And -- and if I could step back and -- and say that I do believe that the language of this arbitration clause is broader than "arising hereunder" --

THE COURT: Okay. Well --

MR. McFARLAND: -- because --

THE COURT: -- point it out to me, and I'll look at it.

MR. McFARLAND: -- the -- well, the -- the language --

THE COURT: I want to make sure that I'm tracking with both of you.

MR. McFARLAND: Sure. The language of "any dispute"

as opposed to "disputes arising hereunder" I believe I've cited some case law in the reply brief that talks about Courts generally identifying that language, "any claim" or "any dispute," as being broader than a simple "arising hereunder."

THE COURT: Well, "any" is a broad word. But, then, it's only the adjective modifying "disputes hereunder." So it doesn't change it. It still has to be a "dispute hereunder."

MR. McFARLAND: I agree. I agree. But I believe it is -- I believe that, in this distinction that Courts make between very narrow provisions and very broad provisions, it fits in the broad category.

THE COURT: Like you and Mr. Iller, I would wish for greater clarity and some black letter law and a bright line rule for all of us so we wouldn't have these issues. Thank you. Anything else?

MR. McFARLAND: You -- I kind of dodged your question there.

THE COURT: There were three claims.

MR. McFARLAND: Yeah. The first one is the marital discrimination, and I believe that that touches on the contract because the contract provides the School District with the right to terminate Dr. Busey for just cause and for the morality provision that's contained in there. And the basis for the termination was the affair with the subordinate. So I believe that the language of the contract with respect to both of those

paragraphs needs to be interpreted in order to have Dr. Busey prosecute that claim.

THE COURT: So, in the January 30th, 2013, letter to Mr. Busey in Paragraph 1 where it says, "You have engaged in a long-standing extramarital sexual affair with a subordinate employee of the Richland School District." That "extramarital" is mere surplusage?

MR. McFARLAND: I think it's -- I don't know if this is the proper analogy, but I think that sometimes that word is used in a generic sense and not specific to husband and wife and -- or one's spouse having an affair outside that relationship. I think it's -- I think, if this case proceeds to trial, the evidence will be that the intent of that was "affair," not "extramarital."

THE COURT: Okay. Then let's talk about the denial of due process. Is your argument that there -- there can't be an argument -- there cannot be a litigated case on that basis because the statutory right to that hearing is based upon the existence of a contract; and, therefore, it's a dispute arising thereunder?

MR. McFARLAND: It's either a dispute directly arising under the contract; or, if you want to take it outside of RCW 28A.300 and say that, under Loudermill and general due process cases, the only property right that Dr. Busey has in the employment that entitles him to any process whatsoever is his

contract for employment. That's the property right that gives rise to the requirement that process be given.

THE COURT: Which of the cases do you think is a best expression of that point?

MR. McFARLAND: Of that point? I -- I can't cite it for you right now, your Honor.

THE COURT: Okay. I don't mean to put you on the spot; but I thought, if there was a case that you both cited, a State of Washington case, that dealt with that issue -- and I want to make sure that I have it correctly. Hang on. The -- the brief, Document 10, says, quote, Busey's 1983 claim is based on a Loudermill and cites to Giedra/Mount Adams School District, a 2005 case, created a property right in a Loudermill hearing. So that property right arises out of Loudermill but assumes an employment relationship.

MR. McFARLAND: It has to assume more than a -- than an employment relationship. It has to assume a protected right in that relationship, which can be the result of, you know, an employment handbook or a contract or, in this case, that property right. The only thing that gives Dr. Busey the right to continued employment and, therefore, a property right in employment is the contract.

THE COURT: And I gather you take some solace from the language in that case, which I guess it's RCW 28A.405.300; but that's interpreted in Foster. And I'll take a look at that

case. I haven't read that one. Okay. Thanks.

MR. McFARLAND: Thank you, your Honor.

THE COURT: Mr. Iller.

MR. ILLER: Thank you, your Honor.

THE COURT: Is the -- is, as counsel says, the rights that he has dependent under the statute that you rely on and, therefore, must, in fact, arise out of a contract? RCW 28 -- the one statute that you folks have been citing to me.

MR. ILLER: 28A.405.300 I believe, your Honor.

THE COURT: Right. Or 28A --

MR. ILLER: Yes. This -- these claims do arise out of the contract. They are asserted. They are in connection with the contract. The problem is that the Richland School District did not use that language in its arbitration clause.

Rather than use the language recommended by the American Arbitration Association, which they quote in the arbitration clause which is "arising hereunder" or "relating to," they use "arising any disputes hereunder." That's the clause -- that's the clause that they drafted that Mr. Busey accepted. Ninth Circuit law is crystal clear that "arising hereunder" is a narrow arbitration clause and that, if parties want to arbitrate all claims between them, they need to use additional language, such as, "relating to" or "in connection with."

The Mediterranean, Tracer, and Cape Flattery cases are exactly on point when it comes to the arbitration language.

They hold, first, "arising hereunder" has the same meaning as "arising under."

Second, that "arising hereunder" is a narrow arbitration clause.

Third, that, under such narrow arbitration clauses, mere "but for" relationship to the contract is not a basis, not sufficient to make a claim arbitrable. And, under such narrow arbitration clause, the only claims that are subject to arbitration are claims that relate to the interpretation and performance of the contract itself. Dr. Busey has submitted no such claims in this case.

I did prepare a table, which discusses the clauses of the Ninth Circuit cases. And I guess -- and I think this is the proof of the pudding that Dr. Busey has the law correct and the Richard School District does not have the law correct. This whole argument in the rely brief and here today that the term "any" somehow broadens the clause and is somehow a distinguishing factor in the Ninth Circuit cases -- they're referring to Cape Flattery in their brief -- is just simply wrong.

The Mediterranean arbitration language was any disputes arising hereunder.

The Tracer arbitration clause: Any controversy or claim arising out of this agreement.

The Cape Flattery v Titan clause: Any dispute arising

under this agreement.

I mean, those are -- have exactly the same meaning as "any disputes hereunder."

The Golden case is the one I originally cited back to the District when they raised that issue. And they -- that clause includes "arising out of," "related to," or "in any way connected with." Much broader than this case. Still, the Golden Court -- and, admittedly, it's another District Court so you're not bound by it -- held that Title VII claims were not subject to arbitration under that broad a clause.

So, really, the School District has the law wrong as to the meaning of "any disputes hereunder." And it also is incorrect on the test as to what constitutes a claim that arises under the contract. Again, the language from Mediterranean, quote, relate to the interpretation and performance of the contract itself, end quote.

And I think the easiest way to prove that this is not such a case is to ask yourself: Assume -- Dr. Busey does not admit it for a minute, but assume that Dr. Busey did breach the contract. Does Dr. Busey still have a Section 1983 claim for the taking of his property right in employment without following the due process established by the statute? The answer is clearly "Yes."

Now, why do we know that? Because the statute provides an extraordinary remedy. It says, if you do not provide notice of

probable cause and an opportunity to be heard prior to a decision to terminate being made, then the contract remains in force; and those causes can never be used again against the employee.

THE COURT: What do you make of the fact that counsel says that it -- "but for" the rights only arise because he has a contract --

MR. ILLER: Well, your Honor, that --

THE COURT: -- and, therefore, it's an enforcement of a statutory right that's dependent upon the existence of a contract? That's his take on that.

MR. ILLER: That is expressly addressed in the Tracer case.

THE COURT: Okay. Let's talk about it.

MR. ILLER: Okay. Tracer says -- and this is quoted in Cape Flattery, quote -- by the Cape Flattery Court -- "Tracer further clarified that a tort claim is not arbitrable just because it would not have arisen 'but for' the parties' agreement." So that exact argument's already been rejected by the Ninth Circuit twice in Tracer and in Cape Flattery.

Now, let's also talk about the "raising" it in defense. So, now, we don't -- certainly the contract is relevant. It will establish the damages that Dr. Busey is covered -- or has suffered. But, in the Golden case, again, at Page 8, the Golden Court states, and I quote, "Defendants represent that they will

defend the discrimination case by showing that their treatment of Dr. Golden, resulted from her poor performance under the contract. But this is not enough to bring the discrimination and defamation claims under the arbitration clause."

Again, another argument made by the Richland School District that's already been rejected by a -- by another Court in this Circuit.

Same holding in Wireless Warehouse v Boost Mobile cited at Page 9 of our brief; another District Court case in Central District of California; same argument: "... At oral argument, Defendant suggested that it will use the Agreement defensively to suggest, for example, that Plaintiff's reliance on subsequent oral promises was not reasonable ..." under "the Agreement's terms. While Defendant's possible state-law defenses might ultimately prove successful, they are insufficient to bring Plaintiff's independent claims within the scope of a narrow arbitration clause when those clauses (sic) do not relate to the interpretation and performance of the Agreement."

And the Court goes on in language which I think is particularly applicable here. Quoting Tracer (sic) again, "Given the clarity of Ninth Circuit case law regarding (sic) the expansive application of arbitration agreements using any one of a familiar set of broad phrases, parties to an agreement need only employ such phrases to ensure the arbitrability of all

claims arising from their relationship or a particular aspect thereof." Actually, it's quoting Zoran Corporation. "The parties in this case agreed instead to a narrow arbitration clause. As such, the Court must effectuate the parties' intent and find Plaintiff's claims outside the scope of the arbitration requirement."

Well, that's exactly the case we have here. The District used the narrow clause, not a broad clause. The reference in the American Arbitration Association rules, which recommend the "arising out of" or "related to" language, which they chose not to use, and now they want to come to court and have this Court save them from their own language and refer all of these other matters to arbitration.

Dr. Busey objects to that. He thinks he's entitled to his day in this courtroom on these claims.

THE COURT: Thank you.

MR. ILLER: Thank you.

THE COURT: Okay. Mr. McFarland.

MR. McFARLAND: Again, your Honor, I'll be brief. There were a couple statements that counsel made right off the bat that I need to highlight. The first one is the concession that these, quote, claims arise out of the contract.

Second, he said the case is based upon the contract.

And, then, towards the end he said the contract is certainly relevant and that the contract establishes Dr. Busey's

damages in this case.

That's the point. The point is it doesn't matter whether you're dealing with a broad arbitration clause or a narrow arbitration clause. All the cases cited by counsel -- or by Dr. Busey and by the District come back whether or not it's a broad clause or a narrow clause and say the touchstone for arbitrability is whether or not the claims relate to the interpretation and performance of the contract. That is what the Court has to determine in this case, not whether the arbitration clause is broad or narrow. It is simply whether or not these are independent tort claims or they are claims that arise out of and relate to the interpretation or require the interpretation and the performance of the contract. That's the sole issue.

There was an argument that the School District is making a "but for" argument in this case. We're not because that's, again, a different issue. What the Tracer Court said is that the "but for" test doesn't necessarily determine arbitrability. And, specifically, you can't just say that, but for the employment relationship, this claim never would have existed. I'll go back to the arbitration -- or, excuse me, the defamation claim. If a School Board member defamed Dr. Busey, that would be an independent claim. But, nonetheless, that claim would be -- or but for the employment relationship, that claim would have never existed. So that's not the standard.

The standard is do -- does the -- do the claims relate to the contract? Do they necessitate interpretation of the contract and to determine whether there's been performance of the contract?

Lastly, your Honor, on Page 7 of Document 5, our opening brief, there's a citation to the case of Madrid v Concho Elementary School District. I think of every case that has been cited by either party, that is the most on point. It deals with a superintendent being terminated prior to the conclusion of the contract and bringing many of the same claims, including discrimination claims, against that school district. And the Court, for the proper analysis, I believe --

THE COURT: What was the language in that case?

MR. McFARLAND: The arbitration language? I can't tell you that, your Honor. I don't know off the top of my head. But, again, I -- I don't think the focus, with all due respect, is on the arbitration clause language but is upon whether or not, under a narrow restrictive arbitration clause or a more broad arbitration clause, simply whether or not those claims can be prosecuted without reference to the contract.

THE COURT: I've listened. If you have more on a different point, I'll be happy to hear that.

MR. McFARLAND: I don't. I don't.

THE COURT: Okay. Thanks.

MR. McFARLAND: Thank you, your Honor.

THE COURT: There's enough language in all the cases so that both parties can confidently express to anyone who'll listen to them that they're absolutely right and that anybody who disagrees with them is quite wrong. There's just that kind of lose language everywhere.

In the Court's mind, this is, in fact, a clause that is very narrow and that the claims cited by the defendant -- by the plaintiff don't, in fact, implicate the arbitration clause.

And, so, I'm going to rule that they're independent of and that the -- the motion to stay proceedings and compel arbitration is denied; and I'll issue a written ruling shortly.

I appreciate your briefing and the good advocacy. Thank you very much.

MR. McFARLAND: Thank you, your Honor.

MR. ILLER: Thank you very much, your Honor.

(Court recessed at 1:39 p.m.)

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C E R T I F I C A T E

I, RONELLE F. CORBEY, do hereby certify:

That I am an Official Court Reporter for the United States District Court for the Eastern District of Washington in Spokane, Washington;

That the foregoing proceedings were taken on the date and at the time and place as shown on the first page hereto; and

That the foregoing proceedings are a full, true and accurate transcription of the requested proceedings, duly transcribed by me or under my direction.

I do further certify that I am not a relative of, employee of, or counsel for any of said parties, or otherwise interested in the event of said proceedings.

DATED this 13th day of August, 2013.

/s/ Ronelle F. Corbey

RONELLE F. CORBEY
Official Court Reporter
Spokane County, Washington